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IN THE

Supreme Court of the United States

October Term, 1955

No. 479

SHIRLINGTON SUPERMARKET, INC., AND ITS SUBSIDIARIES, SHIRLEY FOOD STORE NO. 1, INC., SHIRLEY FOOD STORE NO. 2, INC., SHIRLEY FOOD STORE NO. 5, INC., SHIRLEY FOOD STORE NO. 6, INC., AND WESTMONT SUPERMARKET, INC., RESPONDENT

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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October Term, 1955

No. .....

Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Shirlington Supermarket, Inc., and its subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc., prays that a writ of certiorari issue to review the final Judgment of the Court of Appeals for the Fourth Circuit enforcing a decision and order of the National Labor Relations Board based upon proceedings had in violation of Petitioner's constitutional rights of free speech and in

violation of the provisions of the National Labor Relations Act, as amended, herein referred to as the Act.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fourth Circuit is not yet reported. A copy of the Court's opinion and decree are appended.

The pertinent opinions of the National Labor Relations Board, herein called the Board, are as follows:

Supplemental Decision, Order and Second Direction of Election dated January 15, 1953, reported in 102 NLRB 312 (R. 11-13).*

Second Supplemental Decision and Certification of Representatives dated August 7, 1953, reported in 106 NLRB No. 109 (R. 32).

Decision and Order dated April 29, 1954, reported in 108 NLRB No. 90 (R. 45-56).

JURISDICTION

The judgment of the Court of Appeals was dated and entered July 25, 1955, *as was the dissenting opinion.* The jurisdiction of this Court is invoked under Title 28 of the United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. Whether the Board exceeded the constitutional limits of its power in setting aside an election based on a rule which *requires* an employer, who expresses his views

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* Reference is to the record in the Court below, nine (9) copies of which have been filed with the Court. (The Appendix to the Board's brief (petitioner below) is the only appendix below.)

on unionization to his employees on company time and property, prior to an election, in a lawful and non-coercive manner, *to grant* a labor union a substantially equal opportunity to reply under similar circumstances where the employer has no rule against solicitation, where the Union has openly campaigned and solicited on company time and company premises many times and on many days immediately prior to the election without interference from the employer, and had opportunities to present its views under other circumstances.

2. Whether the Board, in the exercise of its statutory power to control elections, has any power to specify the conditions under which the right of free speech may be exercised.

3. Whether the Board ignored Section 8(c) of the Act in assuming the power to fix the constitutional limits of the privilege of free speech in its conduct of elections, and, if so, whether such assumption is valid.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Section 8(c) of the National Labor Relations Act as amended, 61 Stat. 151, et seq:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter if such expres-

sion contains no threat of reprisal or force or promise of benefit."

3. Section 9(c) 3 of the National Labor Relations Act, as amended (*supra*):

"No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve month period, a valid election shall have been held * * ."

STATEMENT OF THE CASE

This petition seeks review of a judgment of the Court of Appeals for the Fourth Circuit which enforced an order of the Board directing Petitioner to bargain with Local 1501, Retail Clerks International Association, herein called the Union, based on a Board finding that Petitioner had violated Sections 8(a) (5) and (1) of the Act on and after September 14, 1953. The Petitioner admitted the refusal to bargain challenging the validity of the certification of the Union in the underlying representation proceedings. No unfair practice other than the refusal to bargain is involved.

The Petitioner operates five retail stores in the state of Virginia, near Washington, D. C. On petition of the Union an election was scheduled to determine the wishes of the 66 eligible employees, all of whom worked in Petitioner's stores.

The pertinent facts with respect to the representation proceedings are as follows:

1. The First Election

The Union *lost* the first election held on September 6, 1952, by a vote of 24 to 36, and filed objections thereto. The Regional Director recommended that the election be set aside *solely* on the ground that the employer had made speeches to the eligible employees in its stores on

company time about 2½ hours before the election started, and that the "Timing of the speeches denied a substantially equal opportunity for presentation of the Union's views and was tantamount to a refusal to consider a request by the Union to reply". The Petitioner filed its exceptions (R. 9, 10) contending, *inter alia,* that the action of the Director was not authorized either by the Constitution or the Act. Furthermore, that the Union had actively campaigned in the stores for many days prior to the election during company time without the restrictions of a no-solicitation rule and without interference from Petitioner. The Board ordered the election set aside and directed a new one (R. 11-13), on the sole ground aforesaid.

2. The Second Election

The second election was held on February 7, 1953, within 7 months of the first election. The Union won, and Petitioner filed objections thereto, (R. 15, 16) *inter alia,* reiterating its contention that the Board exceeded its authority in setting aside the first election, and that the second election was held in disregard of Section 9(c) (3) of the Act which prohibits a second election in the same unit "within which, in the preceding twelve-month period, a valid election shall have been held", *supra.*

The Board overruled Petitioner's objections and certified the Union (R. 35).

3. The Board's Order

The Petitioner refused to bargain with the Union challenging its certification as a nullity (R. 45) continuing to contend that the *first* election, lost by the Union was *valid,* and that the Board was prohibited by the statute to direct the second election. (Section 9(c) (3) of the Act, *supra.*) *It is conceded that Section 9(c) (3) applies if the first election was valid.* (Board Brief, below, p. 9).

The Board issued its Complaint, and after stipulation (R. 35-45) of the entire record in the underlying representation proceeding, the Board issued its Decision and Order (R. 45-55).

4. The decision of the Court below.

In a 2-1 decision, a majority of the Court below enforced the order of the Board. The majority held that free speech was not involved and that the Board's action in setting aside the first election was within its discretion to insure a fair election despite the fact that the employer's speeches were privileged.

The *dissenting* opinion of Judge Soper (Pet. App. 25), a 16 page vigorous dissent, held that the Board had exceeded the Constitutional limits of its power by *"assuming a power to fix the Constitutional limits of the privilege of free speech," a power which the Act does not and could not confer to it.* (Pet. App. 38) (Emphasis supplied)

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in this case is directly in conflict with the decisions of the Second Circuit Court of Appeals in Bonwit Teller, Inc., v. N.L.R.B., 197 F. 2d 640, and in N.L.R.B, v. American Tube Bending Co., 134 F. (2d) 993; and with the decision of the Sixth Circuit in N.L.R.B. v. F. W. Woolworth Co., 214 F. 2d 78.

The decision in this case was premised on a rule established by the Board in *Bonwit Teller, Inc.,* 96 N.L.R.B. 608. Its effect was that an election is invalid if an employer assembles his employees on company time and property prior to an election and speaks on unionism while denying the union, on request, a similar opportunity to address the employees. On appeal the Second Circuit sustained the Board's action *only* because the employer

enforced a no-solicitation rule, the discriminatory application of which was considered the unfair labor practice. That Court, in direct contrast to the court below, disapproved the equal opportunity test where a no-solicitation rule was not present, holding, "As we have indicated above, the violation here was the discriminatory application of the non-solicitation rule. If Bonwit Teller were to abandon that rule, we do not think it would then be required to accord the Union a similar opportunity to address the employees each time Rudolph made an anti-union speech. Nothing in the Act nor in reason compels such 'an eye for an eye, a tooth for a tooth' result so long as the avenues of communication are kept open to both sides." *Bonwit Teller, Inc.*, v. *N.L.R.B.* supra at 646.

In 1953 this issue again came before the Second Circuit in *N.L.R.B.* v. *American Tube Bending Co., Inc.*, 205 F. 2d 45, and the Court, enforcing again only because of a no-solicitation rule, reiterated that the Board's order could not stand on the equal opportunity test alone.

In the *Woolworth* case, *supra*, the Sixth Circuit, again in contrast to the Court below in this case, and going one step further than the Second Circuit, refused enforcement of a Board's order in similar circumstances where, however, the employer even had a no-solicitation rule. The Court stated the issue involved as: "The question squarely presented in this petition for enforcement is whether an employer which addresses its employees on the subject of unionization, on its premises and during working time in a lawful and uncoercive manner protected by Section 8(c) of the National Labor Relations Act, is required to admit union agents into its premises to address its employees for an equal amount of time during working hours, there being adequate facilities in the immediate area for contact between the union and employees." The *Woolworth* opinion reviews extensively the issue of free speech and the legislative intent "to insure both to

employers and labor organizations full freedom to express their views to employees on labor matters, so long as they refrain from threats of violence, intimation of economic refusal, or offers of benefit" (Senate Report No. 105 on Senate Bill No. 1126, dated April 17, 1947). And at p. 79, the Sixth Circuit held: "In view of the legislative history, while Section 8(c) is a restatement of the principle embodied in the First Amendment of the United States Constitution, its addition to the * * * Act is an authoritative direction given by the Congress to the Board to apply the First Amendment in behalf of the employer as well as the employee." * * * "To compel the employer, if he exercises his right of free speech, to accord * * * to union representatives a similar opportunity in working time, limits the application of the freedom of speech provision written in Section 8(c)." (p. 82). And at p. 83 the Sixth Circuit concludes: "Freedom of speech is guaranteed under the Constitution alike to the weak and the powerful. *The Board is not authorized by construction and implication to limit the freedom of speech established in the Constitution and re-emphasized in Section 8(c).*" (Emphasis supplied) And to the same effect is the concurring opinion in the same case: *"Neither the Constitution, the common law, nor the Labor Management Relations Act confers upon the employees the right to use for union purposes the property of their employer during working hours, over the objections of the employer."* (Emphasis supplied).

Judge Soper, in his dissent, having discussed the decisions in *Bonwit Teller* and *Woolworth*, supra, points up the conflict between the opinion below and those cases, observing, at p. 28, "It is manifest that *all of the judges in these two cases*, in both the majority and dissenting opinions, *would disapprove the action of the Board in the pending case*, since it is conceded that the company permitted the representatives of the union freely to enter

its stores at any time and solicit the votes of the employees." (Emphasis supplied)

2. The decision below is in direct conflict with a decision of the National Labor Relations Board, under the identical circumstances, decided prior to the Board's Order herein, and with a decision of the Court of Appeals for the Eighth Circuit.

As the dissenting opinion confirms, (at p. 28), "• • • the Board itself *prior* to its decision in the pending case, condemned and repudiated its own *Bonwit-Teller* rule • • •", *supra*, which was the basis for setting aside the first election and subsequently issuing the order to bargain." *Livingston Shirt Corporation*, 107 NLRB 109; *Peerless Plywood*, 107 NLRB 106. Judge Soper quotes (pp. 29, 30) from the Board's own decision in *Livingston, supra*, as follows:

> "• • • *If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation.*
>
> 'It is conceded by everyone that Congress intended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and *we find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views.* On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees. • • • there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer's premises outside working hours (absent, of course, a privileged broad no-solicitation rule), solicitation while entering and leaving the premises, at their homes, and at union meetings. These are time-honored and traditional means by which unions have

conducted their organization campaigns, and experience shows that they are fully adequate to accomplish unionization and accord employees their rights under the Act to freely choose a bargaining agent.

"* * * *The majority in Bonwit Teller did not cite, nor have we been able to find, any support in the statutory language or legislative history for holding that the employer who exercises his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees.*

"* * * We reject the idea that the union has a statutory right to assemble and make campaign speeches to employees on the employer's premises and at the employer's expense. We see no real distinction in principle between this and admitting an employer to the union hall for the purpose of making an anti-union speech, a suggestion which our dissenting colleague would doubtless view with abhorrence. *We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them.* It is not to be realistically achieved by attempting, as was done in Bonwit Teller, to make the facilities of the one available to the other." (Emphasis supplied)

The majority below, despite this reversal by the Board itself, upheld the Board's Order in direct contrast to the ruling of the Eighth Circuit in *N.L.R.B.* v. *National Gas Co.*, 215 F. 2d 160. There the Court denied enforcement of a Board Order, where, as here, the Board itself had reversed a rule, and did so during the pendency of the enforcement proceeding. The Court stated

"The Board is asking this Court to enforce an order which it entered upon a state of facts which the Board has later expressly held to be insufficient to justify its taking or exercising jurisdiction under the statute from which its powers are derived.

* * * *

> *"Since our duty is to apply the law in its present form, and not as it existed at the time of the decision and order below* (citing cases), *we must decline to grant the petition for enforcement."* (Emphasis supplied)

The case at bar is in an even stronger position because the rule was changed by the Board itself *prior* to the issuance by the Board of the very order enforced below. As the dissent below held, "The Board was obviously in no position on that date to reaffirm its order of January 15, 1953 setting aside the first election on the basis of the Bonwit Teller Rule, because in the meantime on December 17, 1953 it had denounced that rule" (Appendix, pp. 30, 31).

3. The opinion below is in conflict in principle with the clear holdings of this Court on the expressions of views in labor matters as part of free speech and assembly.

This Court has upheld and protected such expressions as constitutional rights free from the imposition of conditions to their exercise. *Thomas* v. *Collins* 323 U.S. 516, citing *Thornhill* v. *Alabama* 310 U.S. 88, 102; *Senn* v. *Tile Lawyers Protective Union*, 301 U.S. 468, 478. And in *Thomas* v. *Collins* this Court cited *N.L.R.B.* v. *American Tube Bending Co.*, 134 F. 2d 993, and *N.L.R.B.* v. *Ford Motor Co.* 114 F. 2d 905, which upheld the constitutional right of employers to persuade their employees on union affiliation. To the same effect was *N.L.R.B.* v. *Virginia Power Co.*, 314 U.S. 469.

The dissenting opinion, (p. 35) details the successful fight by employers to reach the point that "• • • the Labor Act was not designed to deprive an employer of the right of addressing his employees on the subject of union membership, • • •", and forcibly illustrates the "fundamental" error of the Board in assuming "• • • a power to fix the constitutional limits of the privilege of

free speech" (p. 38) in defiance of the Act and the First Amendment.

Despite the legislative history leading to the enactment of Section 8(c) of the Act and the interpretations of that section as prohibiting the predication of an unfair labor practice on the employer's lawful expression of his views on unionization, the Board continues to accomplish the same result by indirection.

"In the fact of these pronouncements of the courts and of Congress, which would seem to be clear enough, the Board has adopted a new approach to the question. It no longer stigmatizes a non-coercive speech as an unfair labor practice but it asserts the right under certain circumstances to control the utterance of an employer as an exercise of power conferred upon it by the statute to conduct elections. It refrains from holding that an employer's actions immediately before an election constitute unfair labor practices and thus avoids the impact of Section 8(c) of the Act; but it reaches precisely the same end by invoking the provisions of Section 9 of the statute." (Pet. App. p. 36)

Here the Board, mindful of the sanctions imposed on it by Section 8(c) of the Act, has not characterized the conduct of this employer as an unfair labor practice within the meaning of the Act, but has accomplished the same result by condemning such conduct as "discriminatory and prejudiced that atmosphere we believe is essential to a fair exercise of their franchise by the voters" (Pet. App. 21). As the dissent finds, "The will of Congress, as set forth in Section 8(c) of the statute, cannot be evaded by changing the description of the conduct which the Board wishes to restrain. If an employer's speech is coercive to the extent that it prevents 'a fair and untrammelled choice by the employees', it is by the very terms of the Act an unfair labor practice, for that occurs, using the language of Section 8, whenever an employer under-

takes to interfere with or to restrain or to coerce the employees in the exercise of their rights. • • • When we recall the innumerable instances in the past in which the Board has used similar phraseology to stigmatize anti-union utterances of managing officers and supervisors as violative of the act, we can have no doubt that the free speeches in this case amount to an unfair labor practice in the mind of the Board, and would have been so denominated but for the prohibitory words of Section 8(c) of the statute." (Pet. App. pp. 37, 38)

The Board and the majority below cite *N.L.R.B.* v. *A. J. Tower Co.* 329 U.S. 324, and *N.L.R.B.* v. *Waterman Steamship Co.*, 309 U.S. 206, in which cases orders of the Board invalidating elections were upheld on the principle of the *Waterman* case (p. 226) that, "The Control of the election proceedings, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." The discretion conferred by the Act and approved by those cases involved election detail, and "• • • *none of them involve the area of free speech.*" (Pet. App. p. 38), and are "• • • far from sustaining the view that the Board has the power in its discretion to fix the time and place of non-coercive speeches of management and labor in an election campaign, which do not actually interfere with the conduct of the proceeding itself" (Pet. App. p. 39).

4. Foreman & Clark is not authority for the decision below.

The majority opinion below is based on the authority of *Forman & Clark, Inc.*, v. *NLRB*, 9 Cir. 215 F. 2d 396, cert. den. 348 U.S. 887, which the Court says is "practically on all fours" with this case. To the contrary, *Foreman & Clark*, is so completely distinguishable factually from the instant case as to serve as no valid authority whatever.

In the *Foreman* case the employees were not available to the union for contact since they were isolated. As the

Board found "They [the employees] are separately located and in most instances the salesmen are under direction not to enter their work quarters", at p. 399. In the case at issue all of the employees worked daily in grocery stores open to the public and to representatives of the union. They were regularly visited, solicited and addressed by representatives of the union in their regular places of employment, which were, of course, facilities of the employer.

In addition, in the *Foreman* case the protest of the union was that "management's representatives assembled the employees on the premises of the Company, during the working hours of such employees, and there made statements against the union, without the union having the *opportunity* or the *use of equal facilities* to reply . . ." (at p. 400) In the case at issue, according to all the evidence, the union had numerous opportunities and took advantage of such opportunities to solicit and address the employees of Respondent immediately prior to the election and on the Respondent's facilities.

Furthermore, there is no finding in the *Foreman* case as to when or under what conditions the union had solicited the employees of Foreman. The nine establishments of *Foreman* were in different cities. Its President spoke to the employees in three establishments two days prior to the election and in six establishments one day prior to the election. Without a finding in the *Foreman* case as to what opportunities, if any, were available to the union for solicitation before the President's speeches, the need for an opportunity to reply to the statements made by the President may be understood. In the case at issue, contrary to the *Foreman* case, and as stated above, the union had continually solicited and addressed the employees of the Respondent on numerous days immediately prior to the election and on the facilities of the employer.

Finally, in the *Foreman* case (page 401) the Board had found that: "By *thus* using the Company time and property for electioneering speeches to employee assemblies while in effect denying the union *similar* use, the employer prevented the employees from hearing *both sides* of the story under circumstances which *reasonably approximate equality.*" (Underscoring ours) Respondent, at the risk of being repetitious desires to bring to the Court's attention that, contrary to the *Foreman* case, the union in the case at issue did in fact have *similar* use of the employer's facilities and did solicit and address the employees as the result of which the employees did in fact hear *both sides* of the story under circumstances which more than *reasonably approximated equality* to such an extent that Judge Soper commented (Pet. App. p. 26), "The speeches of the representatives of the Company on the day of the election seem to have been the Company's reply to the union, and the company utilized only this one opportunity to influence the votes of its employees."

In the *Foreman* case before the Board, 101 NLRB 40, the Board Chairman (in a 2 to 1 decision) filed a strong dissent expressing his disapproval of the majority conclusions.

CONCLUSION

The questions involved are of major importance in the administration of the Act involving the impact of the constitutional and statutory right of an employer to express his views on unionization to his employees and the imposition of limitations of time and place thereon by the Board in administering election proceedings.

The Court below has approved the assumption of power by the Board to fix constitutional limits on the privilege of free speech, not authorized by the Constitution nor the Act, the effect whereof is to destroy the privilege and

permit the Board to do indirectly that which the Act prohibits directly.

The majority opinion quotes the decision of the Court in *N.L.R.B.* v. *National Plastic Products Co.*, 175 F. (2) 755, 758, as follows: "Insofar as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere, *so long as the Board acts within the limits of the law.*" The Board in the exercise of its discretion must, therefore, *act within the limits of the law.* It has no power or right to specify the conditions under which the right of free speech may be exercised. As Judge Soper said "* * * it is seen at once that the decision lies between the privilege of free speech *guaranteed* by the First Amendment and the power of the Labor Board under the Labor Act to regulate the election of bargaining representatives for the employees. Insofar as they may seem to conflict, there is no choice but to uphold the mandate of the Constitution." (Pet. App. 8) (Emphasis supplied)

A decision by this Court will resolve the conflicts between the various Circuit Courts of Appeals, will aid the orderly administration of statutory election proceedings by the Board where a Constitutional right is involved, and will reaffirm that free speech by employers, and others, in labor matters, is free from trespass by the Board.

We respectfully submit that the petition for certiorari should be granted.

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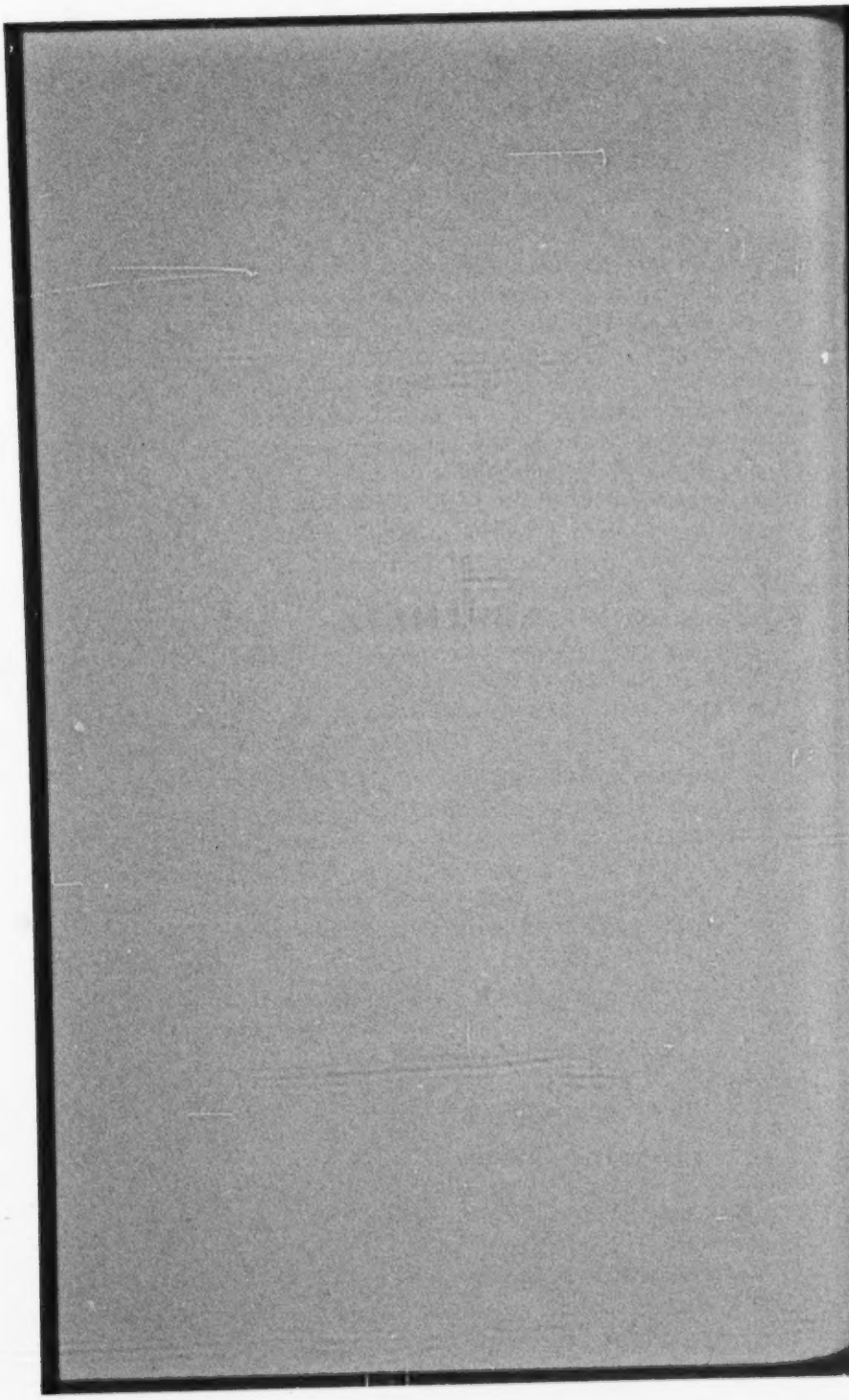
October 1954



APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 6968.

National Labor Relations Board,
Petitioner,

versus

Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the respondent on the 29th day of April, 1954, in proceedings before the said Board numbered 5-RC-1095 and 5-CA-775, entitled "In the Matter of Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc., Employer and Local 1501, Retail Clerks International Association, AFL, Petitioner", and "Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc., and Local 1501, Retail Clerks International Association, AFL", respectively;

upon the answer of the respondent; upon the transcript of the record in said proceedings, certified and filed in this court; and the said cause was argued by counsel.

On consideration whereof, it is ordered, adjudged and degreed by the United States Court of Appeals for the Fourth Circuit, that the said order of the National Labor Relations Board be, and it is hereby, enforced; and that the said Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc., abide by and perform the directions of the National Labor Relations Board in said order contained.

JOHN J. PARKER
Chief Judge, Fourth Circuit

ARMISTEAD M. DOBIE
United States Circuit Judge

I dissent:
MORRIS A. SOPER
United States Circuit Judge.

A true copy,
Teste:

/s/ Richard M. F. Williams, Jr.
Clerk of the United States
Court of Appeals for
the Fourth Circuit.

FILED JUL 25 1955 R. M. F. Williams, Jr. Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 6968.

National Labor Relations Board,
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Shirlington Supermarket, Inc., and Its Subsidiaries, Shirley Food Store No. 1, Inc., Shirley Food Store No. 2, Inc., Shirley Food Store No. 5, Inc., Shirley Food Store No. 6, Inc., and Westmont Supermarket, Inc.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board.

(Argued May 23, 1955. Decided July 25, 1955.)

Before Parker, Chief Judge, and Soper and Dobie, Circuit Judges.

Fannie M. Boyls, Attorney, National Labor Relations Board, (Theophil C. Kammholz, General Counsel; David P. Findling, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and Ruth V. Reel, Attorney, National Labor Relations Board, on brief) for Petitioner, and Joseph F. Castiello (Nathaniel Goldberg and Martin J. Kirsch on brief) for Respondent.

PARKER, Chief Judge:

This is a petition to enforce an order of the National Labor Relations Board directing the Shirlington Supermarket and its subsidiaries to bargain with a union which had been chosen and certified as a bargaining representative of their employees. No unfair labor practice other than the refusal to bargain is involved in the case. The refusal to bargain was based upon the fact that the union had lost a representation election on September 6, 1952, which the Board had set aside, the employer contending that this action of the Board was void and that the subsequent election of February 7, 1953, at which the union won, was likewise void because held within twelve months of the first election. The only question in the case is whether the action of the Board in setting aside the first election was so unreasonable as to amount to an abuse of discretion on its part in the exercise of the power vested in it to supervise and conduct representation elections.

The facts are that the Regional Director of the Board, who investigated the election upon complaint of the union, filed a report in which he recommended that the election be set aside on the basis of the following finding:

> "Investigation reveals that eligible employees were temporarily relieved of their duties, assembled, and addressed on company time and property by employer-representatives who, inter-alia, urged the employees to vote against the Union. These speeches began approximately 1½ hours before the start of the election and in some instances were being delivered while the election was actually in progress.
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> "In the opinion of the undersigned, the timing of the speeches denied a substantially equal opportunity for presentation of the Union's views and was tantamount to a refusal to consider a request by the Union to reply. Nor was the timing of the employer's speeches counteracted by the absence of evidence as

> to a no-solicitation rule or the opportunities which the Union may have had to present its views to the employees under such circumstances."

The Board's reasoning in setting aside the election was as follows:

> "The Regional Director found that eligible employees were temporarily relieved of their duties, assembled, and addressed on company time and property by employer-representatives, who, inter-alia,urged the employees to vote against the Union; and that these speeches began approximately 2½ hours before the start of the election and in some instances were being delivered while the election was actually in progress. As to these findings, the Employer denies only that these speeches in some instances were being delivered while the election was actually in progress.
>
> "Even accepting the employer's denial, we find, as the Regional Director did, that the time of the speeches denied a substantially equal opportunity for presentation of the Union's views and was tantamount to a refusal to consider a request by the Union to reply; and that the timing of the employer's speeches was not counteracted by the absence of evidence as to a no-solicitation rule or the opportunities which the Union may have had to present its views to the employees under other circumstances. We find further, as we have under similar circumstances, that such conduct by the Employer was discriminatory and prejudiced that atmosphere we believe is essential to a fair exercise of their franchise by the voters."

The election was accordingly set aside on the basis of the rule which the Board was enforcing at the time to the effect that an election would not be allowed to stand if the employer immediately preceding the election had addressed the employees on company time and on company

premises without allowing the union an adequate opportunity to reply. See Bonwit Teller 96 N.L.R.B. 608. Since then the rule has been modified so that it is now held that an election is invalidated if either side addresses the employees on company time and premises within 24 hours of an election, irrespective of the opportunity to reply (see Peerless Plywood Co. et al. 107 N.L.R.B. 427); but we need not consider this modification of the rule, as it is perfectly clear that the action of the Board cannot be condemned as arbitrary or unreasonable under the original rule which it applied. Whether a representation election has been conducted under conditions compatible with the exercise of a free choice by the employees, is a matter which Congress has committed to the discretion of the Board. N.L.R.B. v. A. J. Tower Co. 329 U. S. 324, 330. As said in N.L.R.B. v. Waterman Steamship Co. 309 U. S. 206, 226, in which an election was invalidated by the Board, "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone. Interference in those matters constituted error on the part of the court below." In N.L.R.B. v. National Plastic Products Co. 175 F. 2d 755, 758, this court said:

> "The determination of bargaining representatives under the act is a matter that Congress has entrusted to the Board, not to the courts; and when, as here, a certification is called in question in connection with a petition to enforce or review an order of the Board under section 10, 29 USCA sec. 160, the certification must be sustained in so far as fact questions are concerned, if the fact findings of the Board made in conection therewith are based upon substantial evidence. In so far as the certification involves the exercise of discretion, that is a matter with which we are powerless to interfere so long as the Board acts within the

> limits of the law. * * * It certainly was for the Board and not the courts to exercise the discretion as to when the election should be held, upon what payroll eligibility to vote should be determined and whether or not the election should be set aside for irregularities in procedure. For the courts to substitute their judgment for that of the Board in such matters would be for them to undertake an impossible task and entirely to misconceive their function under the statute."

The question before us is, not whether the action of the employer may be condemned as an unfair labor practice, but whether it furnished sufficient ground for the action of the Board in setting aside the election. While an unfair labor practice might or might not be ground upon which the Board would be justified in acting in invalidating an election, infringement of rules adopted to secure a fair and untrammeled expression by the employees would unquestionably furnish such ground. As was said by the Board in the case of General Shoe Corporation 77 N.L.R.B. 124, 126, 127:

> "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammeled choice for or against a bargaining representative. For this reason the Board has sometimes set elections aside in unconsolidated representation cases, in the absence of any charges or proof of unfair labor practice. When a record reveals conduct so glaring that it is almost certain to have impaired employees' freedom of choice, we have set an election aside and directed a new one. Because

> we cannot police the details surrounding every election, and because we believe that in the absence of excessive acts employees can be taken to have expressed their true convictions in the secrecy of the polling booth, the Board has exercised this power sparingly. The question is one of degree.
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> "We think that the Board should apply no different standards in those occasional representation cases which happen to be consolidated with unfair labor practice proceedings for purposes of hearing and decision. On this record, therefore, although the respondent's activities immediately before the election, as described in the Intermediate Report, are not held to constitute unfair labor practices within the meaning of the amended Act, certain of them created an atmosphere calculated to prevent a free and untrammeled choice by the employees."

See also N.L.R.B. v. National Container Corp. 2 Cir. 211 F. 2d 525; The Hills Bros. Co. et al. 100 N.L.R.B. 964.

Directly in point is the decision of the Court of Appeals of the Ninth Circuit in Forman & Clark, Inc. v. N.L.R.B. 9 Cir. 215 F. 2d 396, 410, cert. den. 348 U. S. 887, a case practically on all fours with the case at bar, where the court said:

> "Under the facts of this case, however, viewed in the light of the decisions applicable thereto, we agree with the Board's determination that the tailor-shop employees constitute an appropriate bargaining unit, and with its decision to set aside the first election because of the Company's last minute campaign speeches during working hours, under the circumstances already detailed. The latter decision was a proper exercise of the Board's 'wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bar-

gaining representatives by employees.' National Labor Relations Board v. A. J. Tower Co., supra, 329 U. S. at page 330, 67 S. Ct. at page 328."

The fact that the Board no longer follows the holding of the Bonwit Teller case, to the effect that a non-coercive speech by an employer without adequate opportunity to reply is to be condemned as an unfair labor practice, is no reason why it should not hold such a speech prejudicial to a fair election and set aside the result of the election on that ground. The question here is not one of free speech or of unfair labor practices, but of the Board's judgment in holding last minute, one-sided appeals to employees on company time and property prejudicial to a fair election and setting the election aside for that reason. The soundness of the Board's judgment would seem to be demonstrated by the fact that the result of the election was different when the practices which the Board regarded as prejudicial were not engaged in. Certainly, we would not be justified in setting aside its action as an abuse of discretion in the light of the circumstances before us.

The order of the Board will be enforced.

Order Enforced.

SOPER, Circuit Judge, Dissenting:

When the facts of this case are made plain, it is seen at once that the decision lies between the privilege of free speech guaranteed by the First Amendment and the power of the Labor Board under the Labor Act to regulate the election of bargaining representatives for the employees. Insofar as they may seem to conflict, there is no choice but to uphold the mandate of the Constitution;; and so the question at issue is, not whether the Board abused its discretion in setting aside the election of September 6,

1952, which the union lost, but whether the Board exceeded the constitutional limits of its power.

The facts, although inadequately set forth in the report of the Regional Director who conducted the election, are not in dispute. The company operated five retail grocery stores in Virginia near the City of Washington, whose 66 employees were found by the Board to constitute an appriate bargaining unit; and the Board directed that an election be held to determine their wishes as to bargaining representatives. On the day of the election, about two and a half hours before it began, representatives of the company made a round of the stores and addressed the employees, who were relieved of their duties and assembled for the purpose, and urged them to vote against the union. The report of the Regional Director and the decision of the Board do not set out the contents of the speeches; but there is no showing that they contained any threat of reprisal or force or promise of benefit, and hence we may assume that they were completely unobjectionable. The report of the Director and the decision of the Board also fails to disclose what attempts the representatives of the union made to persuade the employees to vote for it. The Board, however, assumed that the company did not have a no-solicitation rule directed against the union, and hence we may safely accept the assertion of the Company that the union actually carried on its campaign for many days immediately prior to the election and spoke in every store to as many employees and as often as it desired. The speeches of the representatives of the Company on the day of the election seem to have been the Company's reply to the union, and the company utilized only this one opportunity to influence the votes of its employees. The election was set aside simply on the ground that the timing of the speeches made by the representatives of the Company denied a substantially equal opportunity for presen-

tation of the union's views and amounted to a refusal to consider a request by the union to reply.*

The decision was grounded entirely on a rule which had been promulgated by the Board in Bonwit Teller, Inc., 96 N.L.R.B. 608, where a representative of the employer addressed the employees in its store before the election but failed to grant the union's request for a similar opportunity. The rule, known as the Bonwit Teller Rule, was to the effect that an election is invalid where an employer assembles his employees on company time and property before an election an makes a campaign speech while denying or in effect denying the union a similar opportunity to address the employees. The decision of the majority of the court upholding the Board on the pending appeal expresses its approval of the rule in the statement "that the action of the Board cannot be condemned as arbitrary or unreasonable under the original rule which it applied."

This might be the end of the matter were it not for the fact, not heretofore mentioned, that the Bonwit Teller rule has been definitely repudiated as invalid not only by the courts but by the Board itself. The decisions of the courts have not been uniform as to whether an employer is in duty bound under any circumstance to permit the union the privilege of addressing or soliciting the employees on the employer's premises. It was held by the majority of the court in Bonwit Teller, Inc. v. N.L.R.B., 2 Cir. 197 F. 2d 640, that the action of the Board in that case should be sustained because the employer had a no-solicitation rule forbidding the union to solicit votes on the company's property at any time; and a majority of

* The Regional Director reported that in some instances the speeches were delivered while the election was in progress, but this statement was denied by the employer and the Board accepted the denial.

the court thought that it was unfair for the employer to make an anti-union speech in the store and then to deny union officials the right to speak to employees in the store, even during non-working hours. Judge Swann dissented because he thought that the employer had a perfect right to address his men on his own time and property and at the same time to forbid the union to solicit votes thereon.

The Sixth Circuit in a majority opinion in N.L.R.B. v. F. W. Woolworth Co., 6 Cir., 214 F. 2d 78, adopted the views of Judge Swann, while a dissenting judge was in accord with the view of the majority in the Second Circuit. The court sustained the right of an employer to address his employees in the exercise of the constitutional privilege of free speech and held that it was not unfair to deny the union the privilege of addressing or soliciting the employees on their employer's premises, especially as the union had ample opportunity elsewhere to seek out the employees and persuade them to vote in its favor. It is manifest that all of the judges in these two cases, in both the majority and dissenting opinions, would disapprove the action of the Board in the pending case, since it is conceded that the company permitted the representatives of the union freely to enter its stores at any time and solicit the votes of the employees.

The decisions of the Board have varied from time to time as to the extent to which an employer may go in urging his employees to reject the overtures of a union.* Hence it is of great interest, particularly to those who stress the discretionary control of elections vested in the Board by the statute, that the Board itself, prior to its decision in the pending case, condemned and repudiated its own Bonwit Teller rule in the case of Livingston Shirt Corp., 107 N.L.R.B. 400, where the Board held that an

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* See N.L.R.B. v. F. W. Woolworth Co., 6 Cir. 214 F. 2d 78, 80; Livingston Shirt Corp., 107 N.L.R.B. 400, 407.

employer was within his rights who addressed an anti-union non-coercive speech to assembled employees on his own premises on the day before the election, but denied the union a similar opportunity. The Board said: (p. 406)

> "* * * If the privilege of free speech is to be given real meaning, it cannot be qualified by grafting upon it conditions which are tantamount to negation.
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> "It is conceded by everyone that Congress intended that both employers and unions should be free to attempt by speech or otherwise to influence and persuade employees in their ultimate choice, so long as the persuasion is not violative of the express provisions of the Act; and we find nothing in the statute which even hints at any congressional intent to restrict an employer in the use of his own premises for the purpose of airing his views. On the contrary, an employer's premises are the natural forum for him just as the union hall is the inviolable forum for the union to assemble and address employees. * * * there remains open to them all the customary means for communicating with employees. These include individual contact with employees on the employer's premises outside working hours (absent, of course, a privileged broad no-solicitation rule), solicitation while entering and leaving the premises, at their homes, and at union meetings. These are time-honored and traditional means by which unions have conducted their organization campaigns, and experience shows that they are fully adequate to accomplish unionization and accord employees their rights under the Act to freely choose a bargaining agent.
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> "* * * The majority in Bonwit Teller did not cite, nor have we been able to find, any support in the statutory language or legislative history for holding

that the employer who exercises his own admitted rights under the statute thereby incurs an affirmative obligation to donate his premises and working time to the union for the purpose of propagandizing the employees.

"* * * We reject the idea that the union has a statutory right to assemble and make campaign speeches to employees on the employer's premises and at the employer's expense. We see no real distinction in principle between this and admitting an employer to the union hall for the purpose of making an anti-union speech, a suggestion which our dissenting colleague would doubtless view with abhorrence. We believe that the equality of opportunity which the parties have a right to enjoy is that which comes from the lawful use of both the union and the employer of the customary fora and media available to each of them. It is not to be realistically achieved by attempting, as was done in Bonwit Teller, to make the facilities of the one available to the other."

Thus it appears, not only from the decision of the Courts of Appeals but from the decision of the highest administrative authority in this field, that the Board acted erroneously and without legal justification on January 15, 1953 when it set aside the election of September 6, 1952 on the basis of the Bonwit Teller rule and ordered a new election. The employer, however, had no opportunity to protest under the approved procedure until the second election on February 7, 1953 which the union won.* Then the employer refused to bargain with the union and was found guilty of unfair labor practice by the decision of the Board of April 25, 1954 which is now under review. The Board was obviously in no position on

* Section 9 of the Act forbids an election within twelve months after a valid election.

that date to reaffirm its order of January 15, 1953 setting aside the first election on the basis of the Bonwit Teller Rule, because in the meantime on December 17, 1953 it had denounced that rule. It sought, however, to sustain its prior action on the basis of a new election rule which it propounded on November 17, 1953 in the case of Peerless Plywood Co., 107 N.L.R.B. 427. That rule is that an election will be set aside whenever an employer or a union makes an election speech on company time to massed assemblies of employees during the twenty-four hour period preceding the election. This rule seems on its face to be fair and evenhanded, because it applies both to the employer and to the union; but in effect it is aimed at the employer for it is most improbable that an employer, opposed to the union, would be willing to assemble the employees and permit them to be addressed by the union on company time. In any event, and whether or not the new rule is valid, despite its obvious interference with freedom of speech, it cannot be properly invoked in the pending case since it was not in effect at the time that the election campaign was being held. To invoke it at this time would be to deprive the employer of his opportunity to present his views in opposition to those which the union had fully set before the voters, and at a time when there were no restrictions or rules forbidding the employer from making a last minute appeal.

It is true that administrative action is not necessarily invalid because it has a retroactive effect. In Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 203, the court said:

> "That such (administrative) action might have a retroactive effect was not necessarily fatal to its validity. Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such

> retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law.
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> See Addison v. Holly Hill Co., 322 U. S. 607, 620."

That doctrine was applied in N.L.R.B. v. Guy F. Atkinson Co., 9 Cir., 195 F. 2d 141, where the Board held that an employer in the construction business was guilty of an unfair labor practice when he discharged an employee because he had failed to maintain his union membership. At the time the discharge took place, the policy of the Board was to refuse to take jurisdiction in cases where the building and construction industry was involved; but subsequently it reversed its attitude and took jurisdiction in the Atkinson case. The court held that the action of the Board in changing its views and applying a contrary policy to the case before it could not be sustained. The court said: (p. 149)

> "We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors."

Happily the court does not base its decision in the pending appeal on the ex post facto action of the Board.

The point to which the courts and the Board have now come, in holding that the Labor Act was not designed to

deprive an employer of the right of addressing his employees on the subject of union membership, was not easily reached. Since the main purpose of the statute was to strengthen the arm of labor by empowering all employees to bargain collectively through representatives of their own choosing, it was once thought that the employer must maintain absolute impartiality when organization of his employees is taking place, and refrain from opposing the formation of a union.*

The matter was set straight by the Supreme Court in N.L.R.B. v. Virginia Power Co., 314 U.S. 469, 477, where a passing reference was made to the right of the employer under the First Amendment to express his views on labor policies and problems, and in Thomas v. Collins, 323 U.S. 516, where a Texas statute imposing restraints upon labor organizers in the exercise of their right to free speech and free assembly was declared to be in violation of the First and Fourth Amendments. The court said: (p. 532)

> "* * * This court has recognized that, in the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to be indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society.' Thornhill v. Alabama, 310 U.S. 88, 102-103; Senn v. Tile Layers Protective Union, 301 U.S. 468, 478. The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."

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* See Livingston Shirt Corp., 107 N.L.R.B. 400, 411-2.

And in a concurring opinion Mr. Justice Jackson said: (p. 547)

> "Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men. And if the employees or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech, if the two are separable; and only rarely and when they are inseparable to stop or punish speech or publication."

In Thomas v. Collins, supra, the court cited two cases (p. 537) as illustrations of the right given employers by the First Amendment to persuade their employees to join or not to join the union, namely, N.L.R.B. v. American Tube Bending Co., 2 Cir., 134 F. 2d 993, and N.L.R.B. v. Ford Motor Co., 6 Cir., 114 F. 2d 905. In the American Tube Bending case Judge Learned Hand, speaking for the court, held that an employer did not violate the statute who, on the eve of an election, addressed his employees in opposition to the union without threat of reprisal, speaking to two shifts at 3 P.M. and a third shift at 11 P.M. on the day before the election was held. In the Ford Motor Company case the court held that the distribution by the employer to the employees of literature containing uncomplimentary references to labor organization was an exercise of the privilege of free speech guaranteed by the Constitution and was not an unfair labor practice constituting undue interference with the

rights of the employees. Commenting upon the argument of the Board that any sort of influence exerted by the employer upon the employee might easily become coercive, Judge Simmons said: (114 F. 2d 914)

> "* * * If the concept that an employer's opinion of labor organizations and organizers must, because of the authority of master over servant, nearly always prove coercive, ever had validity, it is difficult now to say, in view of the National Labor Relations Acts, its adjudication as constitutionally valid, its strict enforcement by the National Labor Relations Board, and the liberal attitude of the courts in construing it so as best to affectuate its great social and economic purpose, that the concept is still a sound one. The servant no longer has occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied."

Since this was written, fifteen years have passed during which the Labor Board has continued unremittingly its praiseworthy and effective efforts to secure for employees full freedom to bargain without interference so that throughout the country employees have come to realize their complete independence.

Congress has also spoken on this subject. It felt obliged to point out in the reports of its Committees, issued during the passage of the Labor Management Act, that the Labor Board had not faithfully followed the decisions of the courts, but had placed a restricted construction thereon and thereby impaired the employer's right of free speech.* Hence Congress enacted §8(c) of the new statute in the following words:

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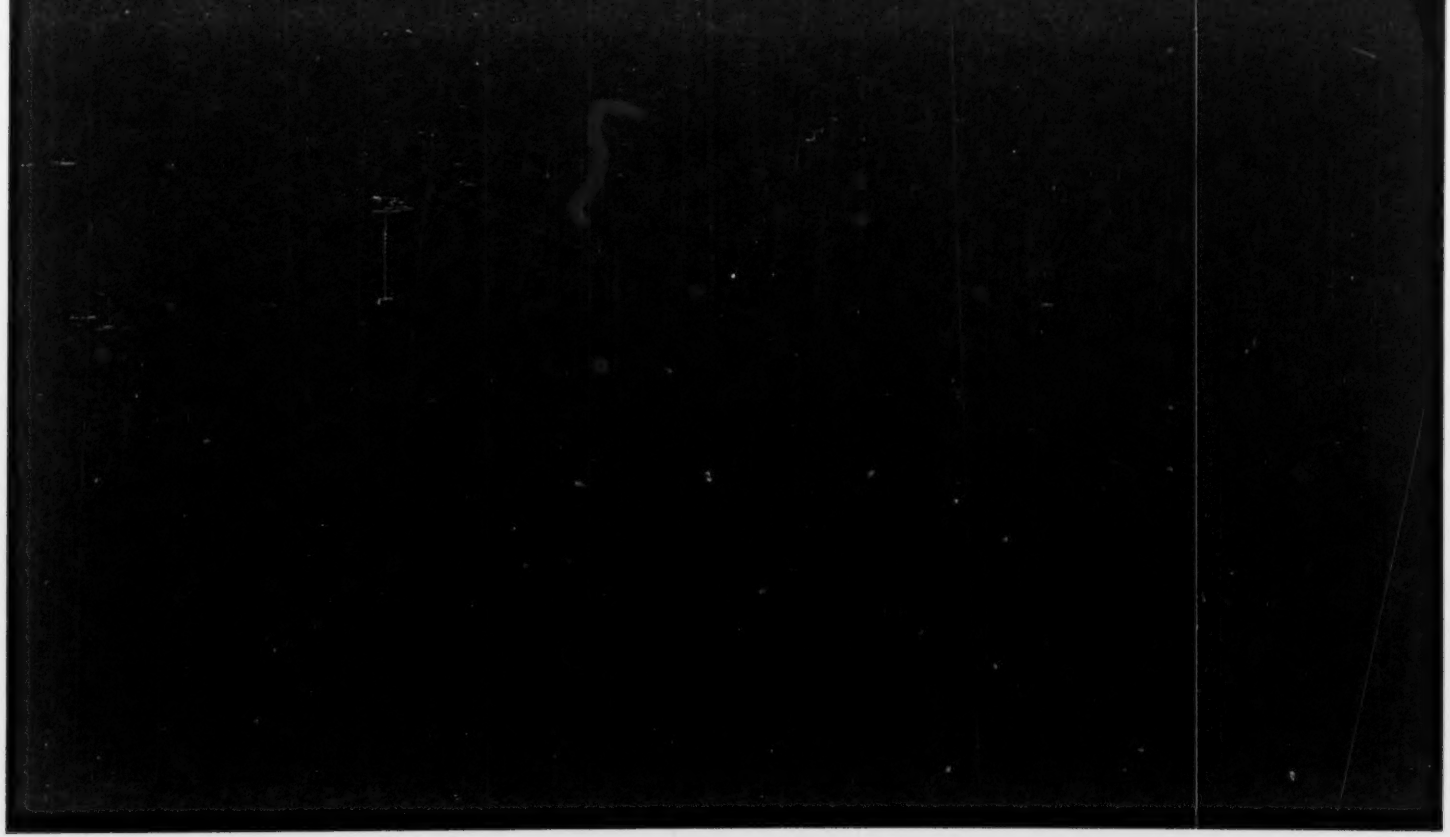
* Senate Report No. 105, 80th Congress, 1st Sess. pp. 23-24: 'Section 8(c). Another amendment to this section would insure both to employers and labor organizations full freedom to express

conduct was discriminatory and prejudiced that atmosphere we believe is essential to a fair exercise of their franchise by the voters." When we recall the innumerable instances in the past in which the Board has used similar phraseology to stigmatize anti-union utterances of managing officers and supervisors as violative of the act, we can have no doubt that the free speeches in this case amount to an unfair labor practice in the mind of the Board, and would have been so denominated but for the prohibitory words of Section 8(c) of the statute.

The error of the Board, however, is more fundamental. We are dealing not merely with statutory but also with constitutional rights. Section 8(c) of the statute was merely a restatement of the principle embodied in the First Amendment,* so that by ignoring the statute the Board invades a broader field and assumes a power to fix the constitutional limits of the privilege of free speech. There is nothing in Section 9 of the Act which purports to confer or could confer this power. The cases cited in the opinion of the court on this point clearly illustrate the nature of the control over election proceedings which the Board possesses and none of them involve the area of free speech. Labor Board v. Waterman S/S Co., 309 U.S. 206, 226, condemned the act of an employer who permitted the representatives of one union to make contact with men on shipboard while denying a similar opportunity to a rival union in a pre-election campaign. The principal question involved in Labor Board v. Tower, 329 U.S. 324, and N.L.R.B. v. National Plastics Products Co., 4 Cir., 175 F. 2d 755, was the eligibility of certain voters and the court held that matter to be within the exclusive discretion of the Board. In short, as said in Labor Board v. Waterman S/S Co. at p. 226, "the control of the election proceeding and the determination

* N.L.R.B. v. F. W. Woolworth Co., 6 Cir., 214 F. 2d 278, 279.

of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." But that holding is far from sustaining the view that the Board has the power in its discretion to fix the time and place of non-coercive speeches of management and labor in an election campaign, which do not actually interfere with the conduct of the election proceeding itself.



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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 479

SHIRLINGTON SUPERMARKET, INC., AND ITS SUBSIDIARIES, SHIRLEY FOOD STORE NO. 1, INC., SHIRLEY FOOD STORE NO. 2, INC., SHIRLEY FOOD STORE NO. 5, INC., SHIRLEY FOOD STORE NO. 6, INC., AND WESTMONT SUPERMARKET, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 19-39) is not yet reported. The findings of fact, conclusions of law and order of the Board (R. 45-55)[1] are re-

[1] "R" references are to the pages of the appendix to the Board's brief in the court below.

ported at 108 NLRB 579. The decisions and orders of the Board in the representation proceeding (R. 11-13, 32-35), upon which the decision and order in the unfair labor proceeding is based in part, are reported at 102 NLRB 312 and 106 NLRB 666.

JURISDICTION

The judgment of the court below was entered on July 25, 1955 (Pet. 17-18). The petition for a writ of certiorari was filed on October 20, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

In the conduct of an investigation concerning representation of petitioner's employees, the Board set aside an election and directed a new one because petitioner, immediately preceding the first election, temporarily relieved its employees of their duties, assembled and addressed them, urging them to vote against the Union, and in effect denied the Union a substantially equal opportunity for presentation of its views. The question presented is:

Whether the Board, in the exercise of the power vested in it under Section 9(c) of the Act to investigate questions concerning representation, abused its discretion in setting aside the election because of the employer's speeches in these circumstances even though the Board would not find such speeches to be an unfair labor practice.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 17-20.

STATEMENT

I. The Board's Findings of Fact and Conclusions of Law

Upon the usual proceedings pursuant to Section 10 of the Act, as amended, the Board on April 29, 1954, issued its decision and order (R. 45-55), finding that petitioner had violated Section 8 (a) (5) and (1) of the Act by its admitted refusal to bargain collectively with Local 1501, Retail Clerks International Association, AFL (herein called the Union). The Union had been certified following an election conducted by the Board under Section 9 of the Act as the collective bargaining representative of petitioner's employees in an appropriate unit consisting of all grocery clerks, produce clerks, dairy clerks, cashiers, porters, receiving clerks and baggers in petitioner's five stores.

As an asserted defense to its refusal to bargain, petitioner charged that the Board's certification was invalid because based upon an election held within seven months of another election which petitioner contended was valid but which the Board found to be invalid. If the first election, which the Union lost, was valid, Section 9 (c) (3) of the Act would preclude the Board from conducting a second election within 12 months. The pertinent facts relative to petitioner's defense are as follows:

Following the usual investigation and hearing on a representation petition filed by the Union pursuant to Section 9 (c) (1) of the statute, the Board on September 6, 1952, conducted an election among petitioner's employees in the admittedly appropriate unit (R. 1-3). The Union lost the election by a vote of 24 to 36 and thereafter filed timely objections to conduct affecting the results of the election (R. 3-7).

After an investigation, the Regional Director on November 20, 1952, issued a Report on Objections in which he recommended that the election be set aside (R. 7-9). As grounds for setting aside the election, he found that within 2½ hours before the start of the election, eligible employees were temporarily relieved of their duties, assembled and addressed on company time and property by employer representatives who, *inter alia,* urged the employees to vote against the Union; that the timing of the speeches denied the Union a substantially equal opportunity for presentation of its views and was tantamount to a refusal to consider a request by the Union to reply; and that the effect of the timing of these speeches was not counteracted by the opportunities which the Union may have had to present its views to the employees under other circumstances (R. 9).

In exceptions which petitioner filed to the Regional Director's Report (R. 9-10), it did not deny that it had engaged in the conduct described above, but contended that the Union had a substantially equal opportunity for presentation of its

views because for many days prior to the election, the Union through its officers and agents had campaigned and solicited among the employees in petitioner's stores without interference from petitioner. It contended, moreover, that it had a statutory and constitutional right to present its views to its employees without regard to the timing of its speeches and without affording the Union an equal opportunity for presentation of its views.

The Board on January 15, 1953, issued its Supplemental Decision, Order, and Second Direction of Election, upholding the findings of the Regional Director as set forth above and finding, in addition, that petitioner's conduct "was discriminatory and prejudiced that atmosphere we believe is essential to a fair exercise of their franchise by the voters" (R. 49; 12-13). It accordingly set aside the election and directed that a new election be conducted (R. 12).

The Union won the second election, which the Board conducted on February 7, 1953, by a vote of 32 to 23 and the Board certified it as the exclusive bargaining representative (R. 13-14, 35). Petitioner, however, refused to bargain with the Union contending that the Board improperly set aside the first election and that the second election, conducted less than 12 months after the first election, was therefore invalid (R. 44).

Upon charges that petitioner had unlawfully refused to bargain with the certified Union and upon a consideration of the record which the parties had stipulated, the Board rejected petitioner's

defense as to the invalidity of the certification (R. 45-56). It reaffirmed its ruling in the representation proceeding, stating that the first election was properly invalidated because of petitioner's infraction of the Board's then existing election rule, known as the *Bonwit Teller* rule, for cases of that type (R. 50).[2] The Board noted, moreover, that even if its present rule, known as the *Peerless Plywood* rule, were to be applied to the first election, that rule too would require that the election be set aside (R. 50).[3]

The Board accordingly found that the second election, held about seven months after the first election, was valid and that petitioner, by refusing to bargain with the Union after it had won the second election and been certified, violated Section 8 (a) (5) and (1) of the Act (R. 49-50, 51-52).

Subsequently, on May 10, 1954, petitioner filed with the Board a Motion for Reconsideration, contending, so far as here material, (1) that the Board's action in setting aside the first election and ordering a new one was now improper because the *Bonwit Teller* election rule, on the basis of which the Board set aside that election, was subsequently

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[2] The rule, first enunciated in *Bonwit Teller, Inc.*, 96 NLRB 608, October 2, 1951, is to the effect that an election is invalid where the employer assembles his employees on company time and property before an election and makes a campaign speech while denying, or in effect denying, the union a similar opportunity to address the employees.

[3] Under the *Peerless Plywood* rule (107 NLRB 427, December 17, 1953), an election is invalid if either the employer or the union makes a campaign speech to assembled employees during their working time within 24 hours of an election.

abandoned after the Board had certified the Union as the employees' representative but prior to the Board's decision in the unfair labor practice proceeding, and (2) that the *Bonwit Teller* rule is in contravention of petitioner's constitutional and statutory rights of free speech (R. 57-58, 61). On July 19, 1954, the Board issued its opinion and order denying petitioner's motion (R. 67-70).

II. The Board's Order

The Board's order requires petitioner to cease and desist from refusing to bargain with the Union and from in any other manner interfering with the efforts of the Union to bargain on behalf of the employees in the unit found by the Board to be appropriate. Affirmatively, the order requires petitioner to bargain with the Union upon request and to post appropriate notices (R. 54-57).

III. The Decision of the Court Below

The court below, Judge Soper dissenting, sustained the findings and order of the Board (Pet., pp. 19-39). The court held that the Board's election rule pursuant to which the first election was set aside was not arbitrary or unreasonable and that the court therefore would not be warranted in interfering with the Board's judgment in establishing or applying such an election rule (Pet. 21-22). In the court's view, moreover, the "soundness of the Board's judgment would seem to be demonstrated by the fact that the result of the election was different when the practices which the Board regarded as prejudicial were not engaged in" (Pet.

25). The court held that the fact that the Board no longer holds a speech made in violation of the *Bonwit Teller* rule to be an unfair labor practice, as it once did, is no reason why the Board should not hold such a speech prejudicial to a fair election and set aside the result of the election on that ground (Pet. 23-25). It rejected petitioner's contention that the Board's action in setting aside the first election and holding a new one infringed petitioner's statutory or constitutional right of free speech (Pet. 25).

ARGUMENT

1. Petitioner's contention (Pet. 6-9, 11-13) that the decision below is erroneous and in conflict with decisions of this Court and other courts of appeals is based upon the premise that the Board's action in setting aside the first election because of petitioner's pre-election campaign speeches is in derogation of the free speech guarantees of Section 8 (c) of the Act and of the First Amendment. Brief analysis of petitioner's basic premise demonstrates both its insubstantiality and the lack of conflict with the cited cases.

Section 8 (c) provides only that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an *unfair labor practice* under any of the provisions of this Act, if such expression contains no threats of reprisal or force or promise of benefit" (emphasis added). The legislative history confirms what is apparent on the face of the sec-

tion, namely, that it was intended only to preclude the Board from "predicat[ing] any finding of *unfair labor practice* upon" speech which contained no threats of reprisal or promise of benefit (emphasis added). S. Rept. No. 105, 80th Cong., 1st Sess., pp. 23-24. See also H. Rept. No. 245, 80th Cong., 1st Sess., p. 45. Indeed, Congress has specifically rejected an amendment to the Act which would have enlarged the scope of Section 8(c) and would have prohibited the Board from setting aside an election on the basis of speech which contained neither threats of reprisal nor promises of benefit. S. 249, 81st Cong., 1st Sess.; 95 Cong. Rec. 583, 8713.[4]

Here, the Board did not find that petitioner's pre-election speeches were an unfair labor practice. The Board simply concluded that, in view of the circumstances that petitioner temporarily relieved the employees of their duties, assembled and addressed them on company time and property within 2½ hours before the election, and thus in effect denied a comparable opportunity to the Union to reply, petitioner prevented a free and fair election. It ordered a new election to make certain that the employees' votes would reflect fully in-

[4] The amendment was offered after the Joint Committee on Labor Management Relations, established by Congress to study the operation of the amended Act, reported that the Board had interpreted Section 8(c) "not [to] require it to consider as privileged non-coercive statements of an employer in a pre-election atmosphere when the Board is considering objections to the conduct of a representation election." S. Rept. No. 986, 80th Cong., 2d Sess., Part 3, pp. 54-55.

formed judgment on the issues as presented by both sides. As explained by the Board early in the administration of the amended Act, "Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice. * * * In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees" and when "the requisite laboratory conditions are not present * * * the experiment must be conducted over again." *General Shoe Corporation*, 77 NLRB 124, 126, 127. Accord: *Kearney & Trecker Corp.* v. *National Labor Relations Board*, 210 F. 2d 852, 853 (C. A. 7), certiorari denied, 348 U.S. 824; *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 532 (C. A. 2); *National Labor Relations Board* v. *Trinity Steel Co.*, 214 F. 2d 120, 123 (C. A. 5).

Since, as stated above, the Board did not "predicate any finding of unfair labor practice upon" petitioner's speeches, Section 8(c), as its wording and history attest, has no relevance here.

Petitioner's reliance (Pet. 11-13) upon the First Amendment overlooks the decisive fact that the Board, when it set aside the first election and ordered a new one, was not penalizing petitioner for making the speeches, but was simply discharging its duty "to insure the fair and free choice of bargaining representatives by employees." *National*

Labor Relations Board v. *A. J. Tower Co.*, 329 U. S. 324, 330. It was petitioner's refusal to accept the results of the second election (results which petitioner nowhere questions as representing anything but the free and informed views of the employees), and not the speeches before the first election which formed the basis for the Board's remedial order. The vice in the instant case which prompted the Board to set aside the first election was not the contents of petitioner's speeches but rather the denial of "a substantially equal opportunity for presentation of the Union's views * * *." Thus, the basis of the Board's order setting aside the election is not that petitioner exceeded the permissible limits of free speech but that petitioner's speeches were so timed as to be discriminatory and prejudicial to the "atmosphere * * * essential to a fair exercise of their franchise by the voters" (R. 12). In these circumstances, the fact that the Board ordered a new election is in no meaningful sense an invasion of petitioner's acknowledged right of free speech. *Foreman & Clark* v. *National Labor Relations Board*, 215 F. 2d 396, 408, 410 (C. A. 9), certiorari denied, 348 U. S. 887. Cf. *Bonwit Teller, Inc.* v. *National Labor Relations Board*, 197 F. 2d 640, 645 (C. A. 2), certiorari denied, 345 U.S. 905.

In the light of the foregoing considerations, it becomes apparent that no conflict exists, as petitioner asserts (Pet. 6-8), between the decision below and the decisions of the Court of Appeals for the Second Circuit in *Bonwit Teller, supra*, and

National Labor Relations Board v. *American Tube Bending Co.*, 134 F. 2d 993, and the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board* v. *F. W. Woolworth Co.*, 214 F. 2d 78. In none of those cases did the courts have occasion to pass upon, nor did they purport to decide, the authority of the Board to set aside an election because of last minute election speeches made by an employer without affording a similar opportunity to the union. The issue before the courts in those cases was whether the employer had engaged in an unfair labor practice by making such speeches under those conditions and not whether the Board may properly set aside an election because of that conduct. Indeed, the Second Circuit in the *Bonwit Teller* case, *supra*, 197 F. 2d at 642, n. 1, specifically noted that it did not have the latter question before it. Similarly, no conflict exists between the decision below and the decisions of this Court cited by petitioner (Pet. 11). For, as explained above, the ruling below does not infringe upon "the constitutional right of employers to persuade their employees on union affiliation" (Pet. 11).

Equally without foundation is petitioner's further suggestion (Pet. 9-11) that the Board itself has "condemned and repudiated" as erroneous its *Bonwit Teller* election rule on the basis of which it had previously set aside the election. Subsequent to its certification of the Union in the representation proceedings but prior to the issuance of the bargaining order in the unfair labor practice

case, the Board issued two decisions, *Peerless Plywood Company,* 107 NLRB 427, and *Livingston Shirt Corporation,* 107 NLRB 400. In *Peerless Plywood,* a representation case, the Board stated that in lieu of its *Bonwit Teller* rule, it was establishing a new election rule governing pre-election speeches on company time and property and that, pursuant to the new rule, an election would be set aside if either the employer or union made such a speech within 24 hours before the start of the election. On the same day that the Board issued its *Peerless Plywood* decision, it also issued its decision in *Livingston,* an unfair labor practice case, in which it reversed its previous view that an employer's pre-election speech under circumstances comparable to those involved in this case could be proscribed as an *unfair labor practice.*[5] But, of course, as contemporaneously held in *Peerless Plywood,* such speeches, because made

[5] The excerpts from that decision quoted by petitioner (Pet. 9-10) and by Judge Soper in his dissenting opinion (Pet. 29-30) represent the views of two of the four Board members who participated in the *Livingston* decision. A third member concurred in the result reached but stated: "I am unable to subscribe to the view that the 'employer free speech' section of the Act is the basic principle governing the disposition of the precise question before us. The Court of Appeals for the Second Circuit, in the *Bonwit Teller* case, rejected a similar argument advanced by the employer" (107 NLRB at 409). The fourth Board member filed a dissenting opinion, disagreeing with both the rationale and result reached by the other Board members. But even if the quoted language were to be considered the views of the Board, since it was addressed to the question whether the employer's conduct could be proscribed as an unfair labor practice, and not to the question whether such conduct might warrant the Board in setting aside an election, it is not relevant to the issues in this case.

within 24 hours before the start of the election, would constitute grounds for setting it aside.

The Board did not, as petitioner asserts (Pet. 9, 10), hold in the *Livingston* case that it was without authority to set aside an election because of conduct such as is involved here. To the contrary, the Board in *Livingston* and the companion case, *Peerless Plywood,* reaffirmed its authority to set aside elections because of conduct such as that engaged in by petitioner (electioneering speeches on company time and property within 24 hours before the start of the election). And the Board expressly recognized in its order denying petitioner's motion for reconsideration in this case (R. 67-68) that "The *Bonwit Teller* rule, which was the rule in effect at the time of the first election, was a valid exercise at that time of the Board's administrative discretion in establishing election rules."

2. Petitioner's assertion (Pet. 10-11) that the intervening change in the Board's election rules, noted above, barred enforcement of the Board's order in the unfair labor practice case is without merit. Like other matters entrusted to the Board's discretion, election rules may be modified or abandoned if the Board on the basis of "enlightenment gained from experience" (*National Labor Relations Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 346) finds the need for a change. And action taken pursuant to one valid rule is not nullified merely by the subsequent adoption of another rule in its place. *Foreman & Clark* v. *National Labor Relations Board,* 215 F. 2d 396, 409-410

(C. A. 9), certiorari denied, 348 U. S. 887. Cf. *Brooks* v. *National Labor Relations Board,* 348 U. S. 96, 104, n. 16; *National Labor Relations Board* v. *Armco Drainage & Metal Products,* 220 F. 2d 573, 583-584 (C. A. 6), certiorari denied, October 10, 1955, No. 237, this Term; *National Labor Relations Board* v. *Red Rock Co.,* 187 F. 2d 76, 77, 78 (C.A. 5), certiorari denied, 341 U.S. 950; *National Labor Relations Board* v. *Stanislaus Implement and Hardware Co.* (C. A. 9), October 12, 1955, 36 LRRM 2735.

Nor is the decision of the Eighth Circuit in *National Labor Relations Board* v. *National Gas Co.,* 215 F. 2d 160, to the contrary, as petitioner contends (Pet. 10-11).[6] In that case the court refused to enforce a Board order apparently because of the circumstance, not present here, that the Board, prior to the announcement of new jurisdictional standards, had "expressly overruled" its own decision in *National Gas* as an "unwarranted extension" of its then controlling jurisdictional policy (*Brooks Wood Products,* 107 NLRB 237, 238). As noted above, the Board in neither its *Peerless Plywood* nor its *Livingston* decision repudiated the

[6] Petitioner's contention that the court below erred in enforcing the Board's order in view of the intervening change in election rules and its allied contention that the decision conflicts with *National* Gas presents substantially the questions which this Court has declined to review in *Foreman & Clark, supra,* 348 U.S. 887; *Thomas Rigging Co.* v. *National Labor Relations Board,* 348 U.S. 871, rehearing denied, 348 U.S. 932; *Homedale Tractor & Equipment Co.* v. *National Labor Relations Board,* 348 U.S. 833; *Southern Pine Electric Cooperative* v. *National Labor Relations Board,* No. 152, this Term, certiorari denied, October 10, 1955.

Bonwit Teller rule as an erroneous or invalid exercise of the Board's administrative discretion in establishing *election rules*. On the contrary, the Board adheres to the position that last-minute electioneering on the employer's time may, as in this case, interfere with the expression of a free choice at the polls and warrant the ordering of a new election. Whether the former *Bonwit Teller* rule or the current *Peerless Plywood* rule is applied, the result in this case would be the same. Either rule would afford a lawful basis for setting aside the election because of the employer's last-minute campaign speeches on company time.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1955.

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151, *et seq.*,), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer

declines to recognize their representative as the representative defined in section 9 (a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period a valid election shall have been held. * * *

(d) Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court

enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

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